13

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 1209

LOUIS BURALL,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

Subject Index

Table of Authorities Cited

Cases

Codes

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Louis Burall petitions that a writ of certiorari issue to review a judgment entered against him on December 12, 1944, by the United States Circuit Court of

Appeals for the Ninth Circuit, in a cause pending therein numbered and entitled, "No. 10,724, Louis Burall, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee." The said judgment affrms an order of the U. S. District Court for the Northern District of California, Southern Division, denying his petition for a writ of habeas corpus.

JURISDICTIONAL STATEMENT.

Under authority of 28 U. S. C. A., Sec. 454, the petitioner addressed and presented to United States Judge Michael J. Roche a petition for a writ of habeas corpus seeking his discharge from the custody of the respondent. The petition asserted his detention was unlawful for having arisen out of a judgment of conviction, sentence and commitment which were void because, during the course of the criminal prosecution in the District Court in which he was convicted of the crime of mail robbery, he had been deprived of the assistance of his counsel at his preliminary hearing before a U. S. Commissioner in violation of the 5th and 6th Amendments. The petition was entitled "To Michael J. Roche, one of the District Judges of the United States District Court, the Northern District of California", and contained the prayer "Your Honor should issue the writ of habeas corpus ad subjiciendum." It was addressed to and presented to him in his individual capacity as a judge in whom the personal power and jurisdiction to grant the writ is lodged

by 28 U. S. C. A., Sec. 452. It was neither addressed to, intended for nor presented to any Court or to any other judge, the petition narrating petitioner's reasons for making his selection of a particular judge, under Sec. 454, instead of any Court or other judge likewise authorized under Sec. 452 to entertain such applications.

Judge Roche took no judicial action of any kind upon the petition addressed to him in his capacity as such judge. Instead he caused the petition, which was not entitled in the District Court, to be filed with the clerk of that Court who treated it as an ordinary civil filing therein and applied to it a mandatory rotary rule of assignment of the cases of that court by which the Court's action thereon was to be taken by Judge St. Sure, another judge thereof. That Court, not the judge, but through Judge St. Sure, issued an order to show cause thereon. The issuance of such an order was an expression that he deemed the petition sufficient on its face as pointed out in *Holiday v. Johnston*, 312 U. S. 342, 350. Thereafter, however, he determined that the petition did not state facts warranting the award of the writ and ordered denied its issue. The applicant appealed from this order to the Ninth Circuit Court of Appeals, raising the questions, *inter alia*, of the jurisdiction of the District Court to make the order and of the adequacy of the petition. The Circuit Court affirmed the judgment of the District Court in its entirety.

The order of the District Court denying the petition for the writ was entered therein on December 15,

1943 (R. 22), and was accompanied by an opinion (R. 16-22) reported in 53 F. Supp. 136. The petitioner appealed from said order to the Ninth Circuit Court of Appeals *in forma pauperis* (R. 23-26) on February 16, 1944, the method being recognized as proper in *Paget v. McCauley,* 95 Fed. (2d) 839. The judgment of the Circuit Court affirming the order of the District Court was rendered and entered therein on December 12, 1944 (R. 34), its opinion (R. 31) being reported at 146 Fed. (2d) 230. No petition for rehearing was filed in the Circuit Court by the petitioner. A petition for hearing the cause en banc was filed therein on March 12, 1945, by Denman, C. J., but not having been filed timely was not passed upon because of an obvious want of jurisdiction and was withdrawn.

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction to consider whether the District Court acquired jurisdiction to consider and determine the character of the petition for the writ of habeas corpus and to make an order denying it under authority of Judicial Code, Sec. 128(a) (first), 28 U. S. C. A., Sec. 225(a) (first) and 28 U. S. C. A., Sec. 463(a).

The right of the Supreme Court to assume jurisdiction to review the decision of the Circuit Court of Appeals by writ of certiorari is conferred by Judicial Code, Sec. 240(a), 28 U. S. C. A., Sec. 347(a). Under authority of 28 U. S. C. A., Sec. 350, the petitioner's right to file this petition for certiorari was extended to May 2, 1945, by an order of Mr. Justice Douglas entered herein on March 2, 1945.

QUESTIONS PRESENTED.

1. When a petition for the grant of a writ of habeas corpus is addressed and presented to a specific district judge may he refuse to take any judicial action whatever thereon and, despite the mandate of 28 U. S. C. A., Sec. 455, transfer it to a District Court where, by the application to it of an arbitrary rotative case assignment rule of Court convenience, it is assigned to a department of that Court for the first judicial action to be taken thereon and that Court thereby acquire and assume jurisdiction to grant or deny the writ?

2. Is a petition for a writ of habeas corpus sufficient in alleging an unlawful detention of the petitioner resulting from a judgment of conviction in a criminal prosecution during the course of which a U. S. Commissioner deprived him of his right to be represented by his counsel at his preliminary hearing?

ASSIGNMENT OF ERRORS AND REASONS RELIED ON FOR ALLOWANCE OF WRIT.

ERROR 1.

The Circuit Court of Appeals has decided an important question of federal law, arising under 28 U. S. C. A., § 455, which has not been but should be settled by this Court, in giving a negative answer to the question stated in its opinion in this case, as follows:

> "2. Whether it is mandatory that a petition of [for a writ of] habeas corpus addressed to a specific judge of the district court must be heard

and determined by that judge to the exclusion of any other judge of the same court."

The negative answer is given despite the provision of 28 U. S. C. A., § 455 providing that the District *judge* to whom the application for a writ of habeas corpus is made, as such judge, "shall forthwith" determine whether the petition states facts entitling the applicant to the issuance of the writ and if so "shall forthwith award" the writ to the applicant. Section 455, the construction and validity of which is involved herein, reads:

> "Allowance and direction. The court, *or* justice, *or* judge *to whom such application is made shall forthwith award* a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."[1]

This claim of error concerns the jurisdiction and judicial functions of the judge in the "forthwith" awarding of the writ under § 455 which brings the allegedly wrongfully imprisoned person out of the custody of the respondent and into the custody of the judge or Court. It does not concern the subsequent more deliberative proceeding after the writ is awarded by the judge and after the Court, not the judge, has issued the writ (28 U. S. C. A., § 451) and the merits are determined by the Court as in *Ex parte Clarke*, 100 U.S. 399 and *In re Fitton*, 45 Fed. 471.

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[1]Emphasis supplied by petitioner.

ERROR 2.

This assignment of error assumes that a district judge to whom the petition is addressed may refuse to consider and decide the sufficiency of the petition but may file it in the District Court and transfer to it the jurisdiction to consider and adjudicate upon its allegations and order the award of or the denying of the award of the writ.

The Circuit Court of Appeals has decided an important question of federal law, arising under 28 U. S. C. A., § 455, which has not been but should be settled by this Court, in holding valid a mandatory rule of rotation of selection of one of the four district judges of the Northern District of California for Court action upon the petition for a writ of habeas corpus which in the instant case did prevent and,[2] in an average of three-fourths of such petitions will prevent, the "forthwith" action of the Court required

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[2]The petition is dated Sept. 16, 1943. (R. 9.) Its accompanying affidavit is dated Sept. 17th. (R. 3.) The record does not disclose the date it was received by Judge Roche. It was filed in the District Court on Oct. 1, 1943. (R. 13.) On Oct. 14th that Court issued an order to show cause why the writ should not issue, returnable Oct. 20th, and directing service be made on the respondent and the U. S. Attorney. (R. 14.) On October 18th the respondent made a motion to dismiss the petition and the Court appointed counsel to represent the petitioning pauper prisoner in the proceeding. On Dec. 15, 1943, the Court entered an order (R. 22) dismissing the order to show cause and denying the petition for the writ. While the word "forthwith" in § 455 does not mean instanter it would not seem to authorize the unusual period of delay the petition encountered under treatment by Rule 1 of the Rules of Practice of that Court. What this Court said of like treatment of a petition for the writ in *Holiday v. Johnston*, infra, would seem appropriate here, viz., "It is said that the procedure tends to expedite the disposition of habeas corpus cases. The record in this case would seem to contradict the argument."

by 28 U. S. C. A., § 455, supra. The rule, the validity of which, only *as applied* herein, is involved herein, is Rule 1 of the Rules of Practice of that District Court, as follows:

> "Rule 1. All actions and proceedings of whatsoever kind or nature—including criminal, admiralty and bankruptcy—shall be assigned to the several Judges in regular rotation, by the Clerk. Such assignment shall be made immediately upon the filing of the first document, and shall be indicated by placing the initial of the Judge's surname after the case number. No change in any assignment shall be made except by Court order approved by the Judges affected."

There being three divisions in the Northern District of California in which a district judge may be sitting, one judge sitting at Eureka, California, over 300 miles from the Court in San Francisco in which one or two other judges may be sitting, with a fourth judge sitting in Sacramento, California, over 350 miles from Eureka and

under which mandatory rule a petition for the writ addressed to the Court in Eureka well may be required to be heard by the judge in Sacramento, 350 miles away, or one of the judges in San Francisco, 300 miles away, and

under which rule the petition cannot be considered "forthwith" by the Court in Eureka but must wait until the judge there has the case reassigned to him by Court order approved by the two judges so distantly situated, the San Francisco or Sacramento judge re-

quired to approve the order quite possibly being ill or temporarily absent from such cities.

ERROR 3.

The opinion of the District Court below is signed by the four district judges of that Court. In holding that a petitioned judge may refuse to act on a petition for a writ of habeas corpus as required by § 455, and transfer by rule of Court to some other judge the jurisdiction to order or deny the writ on the allegations of the petition, they state that petitioner's contrary contention is "notwithstanding the established practice of this Court, which has obtained for many years, and is convenient for the dispatch of its business." Likewise the opinion of the Circuit Court of Appeals states "Moreover, such a rule would make it difficult for the District Court to carry on its business in an expeditious and orderly way if numerous petitions were addressed to one judge of the Court. It has been the established practice of the District Court and has been found convenient for the dispatch of its business to assign all cases as they are filed in rotation to the different judges regardless of whether they are addressed to one judge or to the court."

The Circuit Court of Appeals, in affirming with approval such a justification on the ground of convenience or otherwise a district judge's so declining to act and so transferring the jurisdiction to act, "has decided a federal question in a way * * * in conflict with an applicable decision of the Supreme Court," namely, *Holiday v. Johnston*, 313 U. S. 342.

In the latter case the District Court for the Northern District of California was reversed for holding valid a rule of Court substituting for the district judge a commissioner to hear the testimony on the issue joined by the return to the writ of habeas corpus. This was despite the provision of § 761 of the Revised Statutes that "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

There, as here, the district judge by a rule of Court sought to substitute another person to perform his judicial function. In reversing and holding that the district judge could not substitute the commissioner for himself because "it is a convenient practice" and "tends to expedite the disposition of such cases", the Court states (pp. 351, 352, 353).

> "We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in *the judge* the duty of investigation. * * * We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the *judge's own exercise* of the function of the trier of the facts.

"The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found *a place in a rule of court,* cannot overcome the plain command of the statute * * *

It may be that the practice is a convenient one, but, if so, that consideration is for Congress. *In view of the plain terms in which the Congressional policy is evidenced in the Habeas Corpus Act, the courts may not substitute another more convenient mode of trial* * * *

In summary, we hold that the provisions of the habeas corpus act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. *The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings* * * *"

IMPORTANCE OF THIS CASE OF FIRST INSTANCE IN ANY APPELLATE COURT.

Until such recent refusals to act judicially on petitions for writs of habeas corpus by the district judges of the Northern District of California, in the hundreds of habeas corpus cases in the 155 years of federal adjudication none is cited by the Circuit Court, and your petitioner is unable to find any, in which a district judge has refused to consider and determine the validity of a petition for the writ and

to order the issuance of the writ if cause is stated in the petition.

Many likely situations may be conceived from the Circuit Court's justification of this "convenient" violation of § 455 of which the following is one. If the friend of a kidnaped man, being poisoned by his captors in a hideout in the forest near Eureka, California, filed in the District Court in Eureka a petition for a writ of habeas corpus, the rule would *require a delay of several days, maybe a week,* to forward the petition to the distantly assigned Sacramento or San Francisco judge, who may be out of town, obtain his order substituting the Eureka judge, file it in the Court, and notify the Eureka judge and obtain his consent. During that time the kidnaped man would die.

It is also conceivable that in such a situation the judge in Eureka would award the writ at once, *but in so doing he would violate the mandatory rule for action by a rotatively assigned judge, which rule the Circuit Court's decision here holds valid.*

In this connection it should be noted that the disturbance of the convenience of the District Court is the same as in *Holiday v. Johnston,* supra. It is the number of petitions from the federal penitentiary at Alcatraz in the jurisdiction of that Court.

The added judicial burden to any more often petitioned judge over that of the others, were it as onerous as the Circuit Court presumes it to be, is easily remedied. Rule 1 of the District Court may be amended to

provide that whenever a district judge notifies the clerk that a petition for the writ has been addressed to and received by him, it should take the place of the next case rotatively assigned to him under the present rule.

Instead of so amending their rule, the four district judges are attempting to repeal § 455 *and substitute something like the law as it was before that section was adopted.* (This is despite the necessary inference that Congress in enlarging in § 455 the power of the justices and judges which they "*shall* forthwith" exercise, must have intended that they would not refuse to exercise it.) The four judges frankly say as much, for their opinion below approves of the previous opinion of that District Court in *Wright v. Johnston,* 49 F. Supp. 748, which states (p. 750):

> "* * * By the predecessor statute, R. S. § 752, originally derived from 1 Stat. 81, judges of the several federal courts were granted power individually to award writs of habeas corpus *only during vacation.* See State v. Sullivan, C. C., 50 F. 593.
>
> Justice required that the detained person should not be compelled to await a regular session of the court, which might be a long time distant and removed from the place of imprisonment. See Ex Parte Everts, 8 Fed. Cas. page 909, No. 4581."

As stated by the Supreme Court in *Holiday v. Johnston,* if these judges desire to return to this more "convenient" condition of the law giving to the dis-

trict judges the jurisdiction to consider such writs only in the short periods between the regular session of the Court "that consideration is for Congress."

In this connection it should be noted further that no one of the four district judges has sought relief either directly in the Congress by having a bill introduced there, or indirectly through the Circuit Council, annual Circuit Conference or the Conference of Senior Circuit Judges.

ERROR 4.

In holding that a deprival of petitioner's right to counsel at the preliminary hearing before the U. S. Commissioner did not void the trial proceedings the Circuit Court of Appeals has decided a substantial question of constitutional law which has not been but should be settled by this Court.[3] It so decided in reliance upon its own prior decision, *Garrison v. Johnston,* 104 Fed. (2d) 128, 130, wherein no such issue was involved or passed upon and which, in turn, was decided upon the strength of a statement of this Court, in *Goldsby v. U. S.,* 160 U. S. 70, 73, that the

[3]The record reveals the petition alleged the commissioner deprived the petitioner of counsel (R. 5, 8, 10) by refusing to allow him to obtain counsel (R. 7) and refusing to allow him a continuance for such purpose (R. 11, 12) and that thereupon the petitioner "demanded counsel to represent him" which was refused and that petitioner thereupon was compelled to plead. (R. 11.) He alleged therein (R. 10) that he was not allowed "to contact" his attorney, Mr. Bell. The Circuit Court's opinion (R. 31) seems to have viewed the demand as having been only one for the assignment of counsel without cost. The petition, however, merely recites that the petitioner (R. 10, 11, 12) was not then informed "that he was entitled to have counsel assigned to assist him without cost".

failure to hold a preliminary examination of an accused doesn't deprive him of his constitutional guaranty to be confronted by the witnesses, an issue patently different from that involved herein. The question herein involves the construction and validity of the Sixth Amendment guaranteeing the petitioner the "Assistance of Counsel for his defense" in a "criminal prosecution" and the right thereto as safeguarded by the due process of law guaranteed by the Fifth Amendment. In *Anderson v. Treat,* 172 U. S. 24, this Court acknowledged that a deprival of the assistance of counsel to an accused person at such a preliminary hearing presents a substantial federal question but did not decide whether such a deprival voided the trial proceedings because the record revealed the accused had waived such a hearing. The precise question involved herein does not appear to have been determined by any appellate tribunal except the Circuit Court in this instance of first impression.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 10,724, Louis Burall, Appellant, vs. James A. Johnston, Warden, United States Peniten-

tiary, Alcatraz, California, Appellee", to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that petitioner have such other and further relief in the premises as may be just.

Dated, San Francisco, California,
April 23, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
April 23, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.